

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **MANUEL MANZANO,**

5 *Applicant,*

6 **vs.**

7
8 **FLAVURENCE CORPORATION;
9 FREMONT COMPENSATION INSURANCE,**

10 *Defendants.*

Case No. LAO 778749

**OPINION AND DECISION
AFTER
RECONSIDERATION**

11 **SAROJINI SINGH,**

12 *Applicant,*

13 **vs.**

14
15 **AMERICAN SHOWER DOOR;
16 REPUBLIC INDEMNITY COMPANY,**

17 *Defendants.*

Case No. AHM 075204

**OPINION AND DECISION
AFTER
RECONSIDERATION**

18 These two cases are combined into a single Decision After Reconsideration because each
19 case raises the same issue of law, namely, whether the workers' compensation administrative law
20 judge (WCJ) correctly dismissed the California Insurance Guarantee Association (CIGA) as a party
21 defendant before a determination of underlying issues related to CIGA's liability. We will rescind
22 the orders dismissing CIGA in both cases and return the matters to the trial level for further
23 proceedings and decision.

24 We hold that generally CIGA should not be dismissed from a case until a determination is
25 made on the issue of the date of injury, or period of injurious exposure, or other underlying issue
26 which if adversely decided against CIGA would result in its liability.
27

1 On February 19, 2002 and on February 22, 2002, we granted reconsideration in AHM
2 075204 and LAO 778749, respectively, in order to allow sufficient opportunity to further study the
3 factual and legal issues in each case. Having completed our deliberations, we issue our decision
4 after reconsideration in both cases jointly.

5 In AHM 075204 (SINGH), defendant Republic Indemnity Company (Republic) challenges
6 the WCJ's Order Dismissing Party Defendant served December 3, 2001, in which the WCJ ordered
7 CIGA/Kemper Insurance Company dismissed as a party defendant. Republic contends that the
8 dismissal was in error because the WCJ failed to receive its objection to the Notice of Intention to
9 dismiss CIGA and further that before any party may be dismissed, the date of injury must first be
10 determined. Republic asserts that CIGA is a necessary party in this matter until there has been a
11 determination as to the actual date of injury.

12 In LAO 778749 (MANZANO), defendant Fremont Compensation Insurance Company
13 (Fremont) challenges the correctness of the December 3, 2001 Order of Dismissal of CIGA,
14 wherein the WCJ ordered CIGA for Superior National Insurance Company (Superior), in
15 liquidation, dismissed. Fremont contends that after it was joined as party defendant, it was denied
16 due process by dismissal of CIGA because it did not have an opportunity to investigate potential
17 liability within ninety days as provided by Labor Code section 5402(b). Fremont further argues that
18 CIGA had not proven special employment under the provisions of Insurance Code section 11663
19 and that the doctrine of laches applied because CIGA waited over one year to file a petition for
20 joinder of Fremont after CIGA assumed the claims of Superior, in liquidation.

21 I. BACKGROUND

22 1. WCAB Case No. AHM 075204 (SINGH).

23 By initial Application for Adjudication dated July 1, 1999, identified as WCAB Case No.
24 AHM 075204, applicant Sarojini Singh alleged cumulative injury during the period from June
25 1998 through February 7, 1999 bilaterally to his hands, arms, shoulders, wrists, bilaterally to his
26 lower extremities and back, while employed by American Shower Door, whose insurance carrier
27 was unknown. An amended claim was filed by applicant on December 26, 2000, identifying an

1 earlier commencement date for cumulative injury from February 7, 1998 to February 7, 1999, with
2 the same body parts shown as injured while employed by American Shower Door, and named
3 California Compensation Insurance Company as the insurance carrier.

4 According to the Workers' Compensation Insurance Rating Bureau print-out, Republic was
5 on the risk from March 1, 1997 through March 1, 1998, with California Compensation Insurance
6 Company on the risk from March 1, 1998 through March 1, 1999. California Compensation
7 Insurance Company became insolvent in September 2000, with CIGA assuming administration of
8 claims, adjusted by Kemper Employers Insurance Company, for the insolvent carrier.

9 On October 17, 2001, the WCJ issued an Order joining Republic as party defendant in
10 response to CIGA's petition for joinder filed on September 27, 2001.

11 Prior to the framing of issues or any trial in this matter, CIGA filed on October 22, 2001 a
12 petition to be dismissed on the basis that there was "other insurance" within the meaning of the
13 Insurance Code section 1063.1(c)(9)¹ during the period of the amended claim from February 7,
14 1998 through February 7, 1999. The WCJ issued a Notice of Intention (NIT) to dismiss CIGA. An
15 order dismissing CIGA issued on December 3, 2001. However, Republic had filed on November
16 29, 2001 an objection to the NIT which was not brought to the WCJ's attention prior to the
17 issuance of the dismissal order. In the objection, Republic referred to the initial Application for
18 Adjudication for a period that was outside of its coverage and raised a statute of limitation defense

19 ¹ Insurance Code section 1063.1 provides, in pertinent part,
20 "As used in this article:

21 ". . . (c) (1) 'Covered Claims' means the obligation of an insolvent insurer, including the
22 obligation for unearned premiums, (i) imposed by law and within the coverage of an insurance
23 policy of the insolvent insurer; (ii) which were unpaid by the insolvent insurer; (iii) which are
24 presented as a claim to the liquidator in this state or to the association on or before the last date
25 fixed for the filing of claims in the domiciliary liquidating proceedings; (iv) which were incurred
26 prior to the date of coverage under the policy terminated and prior to, on, or within 30 days after
the date the liquidator was appointed; (v) for which the assets of the insolvent insurer are
insufficient to discharge in full; (vi) in the case of a policy of workers' compensation insurance, to
provide workers' compensation amendments thereto, not inconsistent with the provisions of this
article necessary to assure the fair, reasonable, and equitable manner of administering the
association, and to provide for such other matters as are necessary or advisable to implement the
provisions of this article. . . .

27 "(9) 'covered claims' does not include (i) any claim to the extent it is covered by any other
insurance of a class covered by this article available to the claimant or insured."

1 to applicant's amended Application for Adjudication filed on December 26, 2000. Republic also
2 indicated that it had not received all medical records.

3 The dismissal Order triggered Republic's instant petition to vacate the order, or in the
4 alternative petition for reconsideration of the WCJ's Order dismissing CIGA.

5 In her Report and Recommendation on Republic's petition pursuant to WCAB Rule 10860,
6 the WCJ recommended that Republic's petition be denied since dismissal was justified based upon
7 Insurance Code section 1063.1(c)(9). The WCJ acknowledges that Republic's timely objection to
8 her NIT did not come to her attention before the Order issued.

9 **2. WCAB Case No. LAO 778749 (MANZANO).**

10 By Application for Adjudication filed on April 24, 2000 in LAO 778749, applicant Manuel
11 Manzano alleged that he sustained on July 21, 1998, industrial injury to his neck, left shoulder and
12 head (hearing), while employed by Parker Personnel, Inc., insured by Superior National Insurance
13 Company.

14 In September 2000, Superior went into liquidation and CIGA assumed administration of
15 Superior's claims. On November 9, 2001, CIGA filed a petition to join Flavurence Corporation as
16 the employer at the time of injury and its insurance carrier Fremont. CIGA also requested to be
17 dismissed as a party defendant based on Insurance Code section 1063.1(c)(9). We note in this
18 petition for joinder that CIGA indicated that applicant alleged two specific injuries occurring on
19 June 21, 1998 and September 11, 1998. But, only a single case number is listed (LAO 778749). In
20 his Report and Recommendation on Fremont's Petition for Reconsideration, the WCJ without
21 explanation also refers to these two specific injury dates.

22 It appears that at the time of the alleged injury dates in 1998, applicant was working as a
23 packer. However, there is a potential general and special employment issue existing under
24 Insurance Code section 11663² as well as the issue of Insurance Code section 1063.1(c)(9).

25 ² Insurance Code section 11663 provides, in pertinent part: "As between insurers of general and
26 special employers, one which insures the liability of the general employer is liable for the entire
27 cost of compensation payable on account of injury occurring in the course of and arising out of
general and special employments unless the special employer had the employee on his or her
payroll at the time of injury, in which case the insurer of the special employer is solely liable."

1 Fremont alleges that at the time of the injury, Parker Personnel, Inc., as a temporary employment
2 agency, had placed applicant for a temporary assignment at Flavurence Corporation. It appears that
3 Superior, now in liquidation, was the workers' compensation insurance carrier for Parker Personnel
4 Inc. and that Fremont was the carrier for Flavurence Corporation. Fremont alleges a general and
5 special employment issue exists under Insurance Code section 11663, whereas CIGA asserts that at
6 the time of the injury that applicant was jointly employed by Parker Personnel, Inc. and Flavurence
7 Corporation, which would relieve it of any liability under Insurance Code section 1063.1(c)(9).

8 At the Mandatory Settlement Conference held on December 3, 2001 pursuant to Labor
9 Code section 5502(d), the WCJ joined Fremont as a party defendant and, over Fremont's objection,
10 dismissed as party defendant CIGA for Superior National Insurance Company in liquidation, and
11 its administrator Integrated Claims Administrators.

12 This led to the instant petition for reconsideration filed by Fremont. Fremont, on behalf of
13 the alleged special employer, alleges that Superior, and subsequently CIGA, had accepted the
14 injury (presumably injury of July 21, 1998) and was paying benefits. It is not clear if benefits
15 continue to be "administered" in light of the aforementioned dismissal.

16 In his January 3, 2002 Report and Recommendation on the petition, the WCJ recommends
17 that Fremont's petition be denied based upon his interpretation and application of Insurance Code
18 section 11663 where Insurance Code section 1063.1(c)(9) applies. The WCJ interprets and applies
19 Insurance Code section 11663 as only applying between "insurers" and not between employers.
20 CIGA is not an insurer. The WCJ also concludes that a year in delaying the joinder of Fremont is
21 insufficient to support laches as asserted by Fremont.

22 II. DISCUSSION

23 CIGA asserts in both of the above entitled cases that it should be dismissed since there is
24 "other insurance" and thus it has no liability pursuant to Insurance Code section 1063.1(c)(9).
25 CIGA cites *Industrial Indemnity Co. v. Workers' Compensation Appeals Board, California*
26 *Insurance Guarantee Association (Garcia)* (1997) 60 Cal.App.4th 548 [62 Cal.Comp.Cases 1661]
27 in support of its position.

1 It is true that under certain circumstances dismissal of CIGA is an appropriate disposition.
2 Insurance Code section 1063.1(c)(9)(i) provides that "[c]overed claims' [do] not include any claim
3 to the extent it is covered by any other insurance of a class covered by this article [14.2] available
4 to the claimant or insured [.]" This section was applied in *Garcia, supra*, where the employee filed
5 a worker's compensation claim for cumulative injury from November 6, 1990 through November
6 6, 1991, during which time the employer had three successive workers' compensation carriers.
7 Before trial, one carrier became insolvent and CIGA sought dismissal from the employee Garcia's
8 case, asserting that the claim was not a "covered claim" under Insurance Code section 1063.1(c)(9)
9 because "other" workers' compensation insurance was available through the other two jointly and
10 severally liable carriers. The WCJ denied CIGA's request for dismissal and issued awards
11 proportionate to the time of coverage of the three carriers. The Board reversed and substituted a
12 joint and several award against the remaining two carriers, concluding that the employee's claim
13 was covered by other insurance because all carriers during the period of exposure were jointly and
14 severally liable for benefits and hence the employee's claim was not a "covered claim" under
15 section 1063.1(c)(9). The Court of Appeal affirmed, holding, in pertinent part:

16 "Garcia had the substantive right to collect his entire benefit award from
17 Industrial and SCIF since each was jointly and severally liable. Since
18 Garcia's benefits claim was fully protected by solvent insurers Industrial
19 and SCIF, both Garcia and his employer had 'other insurance' available
20 within the meaning of Insurance Code section 1063.1, subdivision (c).
21 Hence, the award favoring Garcia against Industrial and SCIF did not
22 constitute a statutorily-defined 'covered claim.' (id. At subd. (c)(9).)
23 Accordingly, the Board properly determined CIGA had no statutory
24 liability for any portion of Garcia's award [Footnote omitted.]" (62
25 Cal.Comp.Cases 1661 at 1669)

26 CIGA's reliance upon *Garcia, supra*, is not helpful. Unlike the instant cases, in *Garcia*
27 there was no dispute regarding the date of injury versus the date of last injurious exposure, or other
threshold issue which if determined adversely against CIGA would result in liability of CIGA. In
Garcia there were three carriers in the period of liability under Labor Code section 5500.5 with one
becoming insolvent after a joint and several award; therefore CIGA was properly dismissed as a
party defendant since it was undisputed that there were two other carriers jointly liable during the

1 period also covered by the insolvent carrier. It was clearly not a "covered claim" under Insurance
2 Code section 1063.1(c)(9) as far as CIGA's liability.

3 In both of the cases before us, unlike the situation in *Garcia, supra*, there are underlying
4 issues which if decided adversely against CIGA would establish its liability.

5 WCAB Case No. AHM 075204 (SINGH) involves alleged cumulative trauma injury claim
6 under Labor Code section 5500.5. There has been no determination of the date of injury or period
7 of injurious exposure based on submission of evidence; therefore, the date of injury under section
8 5500.5 has yet to be determined. It is well settled that for the purposes of liability under Labor
9 section 5500.5, the relevant date is either the date of injury as defined by Labor Code section 5412,
10 or the year immediately preceding the date of last injurious exposure, whichever occurs first. (See,
11 *Western Growers Insurance Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th
12 227 [58 Cal.Comp.Cases 323, 331]; *Aetna Cas. & Surety Co. v. Workmen's Comp. Appeals Bd.*
13 *(Coltharp)* (1973) 35 Cal. App.3d 329 [38 Cal. Comp. Cases 720].)

14 Applicant SINGH initially alleged cumulative trauma injury during a period that the now
15 insolvent carrier was the only carrier on the risk, but later alleged injury during a period that both
16 Republic and the insolvent carrier were on the risk. Against the latter claim, Republic has raised a
17 statute of limitation defense that has not been determined. It has not been determined on evidence
18 whether the date of injury is outside of Republic's coverage and only within the insolvent carrier's
19 coverage or whether the statute of limitation defense will prevail. These are threshold issues which
20 if decided adversely to CIGA, would establish CIGA's liability. Accordingly, it is premature to
21 dismiss CIGA under these circumstances.

22 We recognize that in a situation where the parties stipulate to the elements of date of injury
23 for purposes of Labor Code section 5412, thereby identifying the potential entities that may be
24 liable in the event that injury is found, then CIGA may be dismissed. However, this would likely be
25 the exception, rather than the rule, an issue not presently before us. Therefore, the WCJ's order
26 dismissing CIGA in WCAB Case No. AHM 075204 (SINGH) will be rescinded and the matter
27 returned to the trial level.

1 Likewise, in WCAB Case No. LAO 778749 (MANZANO) there are issues which if
2 decided adversely to CIGA, would result in CIGA's liability, unlike the situation in *Garcia, supra*.
3 It is disputed whether a general/special employment relationship exists under Insurance Code
4 section 11663, whether section 11663 is applicable to CIGA, or whether at the time of the alleged
5 injury applicant was jointly employed by Parker Personnel, Inc. and Flavurence Corporation for
6 purposes of the application of Insurance Code section 1063.1(c)(9). These underlying disputes need
7 to be determined on evidence before entertaining a motion to dismiss CIGA as a party defendant.
8 In addition, and as noted above, CIGA was previously paying benefits on this accepted injury and
9 should continue to pay, subject to a determination of party liability, and CIGA may seek
10 reimbursement depending on the ultimate disposition in this case.

11 In passing we note that with respect to CIGA's potential liability pertaining to the issue of
12 general/special employment and Insurance Code section 1063.1, parties may wish to delay
13 litigation pending a disposition by WCJ Robert T. Hjelle of the Van Nuys District Office relating
14 to Remedy Temp, Inc. and CIGA. We are informed that the narrow issue presented is CIGA's
15 liability where a general/special employment relationship exists. We note that some two hundred
16 cases have been consolidated and that it appears that two have been selected as representative cases
17 for trial and decision. These matters are presently in the discovery stage with an MSC set for
18 August 9, 2002, 10:00 a.m., and a trial date of September 13, 2002, 10:00 a.m.

19 Finally, we observe that generally there should be a hearing and determination of the
20 injured workers' entitlement to benefits and liability for same, before allowing potential defendants
21 to be dismissed. This approach will avoid the necessity for joining and/or rejoining parties
22 depending on the facts that develop in the record.

23 For reasons given above, we conclude that the orders dismissing CIGA in WCAB Case No.
24 AHM 075204 (SINGH) and in WCAB Case No. LAO 778749 (MANZANO) should be rescinded
25 and the matters returned to the trial level for further proceedings and decision consistent with the
26 opinions express herein.

27 For the foregoing reasons,

